93-100
No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

NATIONAL BUSINESS FACTORS, INC.,
a California corporation,
Petitioner,

VS.

EARVIE ROLLINS also known as EARVIE L. ROLLINS, and
BRIDGETTE M. ROLLINS, also known as BRIDGETT ROLLINS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court prevent the garnishment of wages of federal government employees for just debts?

2. If a state court issues a judgment against an employee of the federal government and orders garnishment of the employee's wages, is the garnishment of the wages truly an action "against the federal government" which allows removal of the action to federal court?

3. How should this Court resolve the split between jurisdictions wherein, on the one hand, the Fifth, Tenth and Eleventh Circuits hold that garnishments are not actions against the federal government and therefore are not removable, but, on the other hand, the Ninth Circuit finds otherwise?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GROUNDS FOR INVOKING SUPREME COURT JURISDICTION

Petitioner National Business Factors, Inc. seeks review of a judgment of the United States Court of Appeals for the Ninth Circuit. The judgment was entered on April 22, 1993. 28 U.S.C.A. § 2101(c) provides jurisdiction for the United States Supreme Court to review this judgment within ninety days after such entry, i.e., on or before July 21, 1993.

THE STATUTE INVOLVED IN THE CASE:

The statute involved in this case is 28 U.S.C.A. § 1442(a)(1) which provides:

> § 1442(a). A civil action or criminal prosecution commenced in a state court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending: (1) any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

STATEMENT OF THE CASE

Respondents Earvie and Bridgette Rollins failed to pay for services they received at Brookside Hospital. Petitioner National Business Factors[1] sued to collect the debt. There is no dispute about the debt. A default judgment was entered against Respondents on July 6, 1990.

Petitioner sought to enforce the judgment against Respondents. Both Respondents are employees of the United States government. Petitioner sought to garnish the Respondents' wages. Petitioner obtained a wage garnishment order from the California Municipal Court.

The United States government sought to prevent the garnishment of Respondents' wages. It removed the action from the California Municipal Court to the Federal District Court for the Northern District of California. The District Court quashed the garnishment, holding that the wages of

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[1] Petitioner National Business Factors, Inc., is a California Corporation. It has no parent companies nor subsidiaries.

these federal employees were exempt from garnishment. However, the District Court stated:

> "It is unfair for federal employees to avoid their debts simply because their employer is immune from garnishment actions; the Rollins' hospital bill will likely go unpaid which will result in higher health care costs for others. The government can easily process wage garnishments since federal payroll systems are centralized and computerized."

The District Court quashed Petitioner's garnishment action because the Ninth Circuit prohibits such actions. The District Court followed the Ninth Circuit's policy even though it found that the policy "could be considered an unjust and outdated policy." (See conclusion of Order Granting Government's Motion to Dismiss. A copy of the Order is included in the Appendix.)

The Ninth Circuit affirmed the District Court's order dismissing Petitioner's action. A copy of the Ninth Circuit's memorandum is included in the Appendix.

THE BASIS FOR FEDERAL JURISDICTION

The basis for federal jurisdiction in the United States District Court for the Northern District of California was 28 U.S.C.A. § 1442(a)(1), which is set forth above verbatim. The statute allows actions against the federal government to be removed to federal court. Respondent successfully argued that an order for wage garnishment of a federal employee is an action against the government, providing federal court jurisdiction.

However, there is currently a split of jurisdiction between the circuits as to whether or not wage garnishments against employees of the federal government are removable. This case originated in the Ninth Circuit, where such matters are

held removable. The Fifth, Tenth and Eleventh Circuits do *not* allow removal of garnishment proceedings.

I. THE EXEMPTION FROM WAGE GARNISHMENT IS COMPLETELY UNFAIR. IT ALLOWS THE FEDERAL GOVERNMENT AND ITS EMPLOYEES UNMERITED PRIVILEGES. IT DENIES OTHER CITIZENS THE RIGHT TO COLLECT JUST DEBTS THAT ARE OWED BY FEDERAL EMPLOYEES.

In this case, Petitioner National Business Factors seeks to challenge, and asks this Court to overturn, an unjust federal policy. The policy Petitioner challenges is the federal government's refusal to honor valid garnishment orders of the wages of its employees. The policy is inequitable; while the wages of other citizens are subject to garnishment if those citizens do not pay their bills, the wages of certain (but not all) federal employees are not subject to wage garnishment for unpaid bills.

The policy is illogical because approximately half of the federal agencies do not have wage garnishment exemptions for their employees. For instance, traditional federal government agencies such as the United States Postal Service, the Department of Education, and dozens of other federal agencies are not exempt.

Private employers, such as the petitioner, are required to process wage garnishment orders when one of their employees has not paid a debt. Most, if not all, state and local governments similarly process garnishment orders. However, certain federal agencies are allowed to conduct themselves in a fashion above the law. This creates an unfair advantage for the federal employees who do not pay their debts, yet evade wage garnishment that would apply to all other citizens. This unjust situation contributes to a vision of unfairness in our own federal government.

This case presents a prime example of the unfairness of this policy. Mr. and Mrs. Rollins steadfastly refuse to pay their undisputed hospital bills, increasing health care costs for the rest of the nation. They do this secure in the knowledge that petitioner will be unable to collect from them. The fact that the federal government supports and condones this undermines its credibility. Whatever rationale the government may offer, it is insufficient to overcome this inequity.

Other courts have commented on the unfairness of this policy. The Illinois Supreme Court examined the wage garnishment exemption of its municipal employees, and found such an exemption unfair. In *Henderson v. Foster*, 59 Ill. 2d 343, 319 N.E.2d 789 (1974) the Illinois Supreme Court held "We find that the doctrine of wage-garnishment immunity is unsound and unjust under present conditions and consider that we must abolish that immunity." In *Waterbury v. Board of Commrs.*, 10 Mont. 515, 26 P. 1002 (1891), the Montana Supreme Court abolished that state's exemption because wage garnishment is a "right that is recognized throughout the civilized world; that is, that debtors should pay their debts."

Petitioner respectfully submits that this policy is so manifestly unfair that it should be abolished. The policy raises health care costs for most citizens while unfairly protecting the wages of employees who do not pay just debts. Petitioner asks this Court to review the judgment of the United States Court of Appeals. There are special and important reasons for this review, since the circuits are split about this unfair policy.

II. THERE IS A SPLIT AMONG THE CIRCUIT COURTS REGARDING THE UNFAIR GARNISHMENT EXEMPTION POLICY.

The instant case arose in the Northern District of California, which is in the Ninth Circuit Court of Appeals. The Ninth Circuit holds that wage garnishments are actions against the federal government and are therefore removable to federal district court. *Nationwide Investors v. Miller*, 793 F.2d 1044 (9th Cir. 1986).

However, the Fifth, Tenth and Eleventh Circuits as well as the District Courts in Colorado, Northern Georgia, Nebraska and Western Missouri do not agree with the Ninth Circuit. These courts hold against removal of garnishments of federal employees. These courts all hold that garnishment of a federal employee's wages is not a suit against the sovereign itself.

For example, in *Murray v. Murray*, 621 F.2d 103 (5th Cir. 1980), the Fifth Circuit stated that the federal government's "obligation is unchanged by the summons and garnishment . . ." There, the court held that the federal government is "but a stakeholder in this action." It held against removal, stating: "We do not perceive, and the government does not identify, how the pendency and disposition of the garnishment action in state court could arrest, restrict, impair, or interfere with either the actions of a federal official or the operations of the federal government." See also *Western Medical Properties Corp. v. Denver Opportunity, Inc.*, 482 F. Supp. 1205 (D. Colo. 1980); *West v. West*, 402 F.Supp. 1189 (N.D. Ga. 1975); *KCPO Employees Credit Union v. Mitchell*, 421 F. Supp. 1327 (W.D. Mo. 1976); and *Golightly v. Golightly*, 410 F. Supp. 861 (D. Neb. 1976).

Since the Ninth Circuit's holding is in conflict with the decisions of other United States Courts of Appeals, the

Supreme Court should review the matter. Rule 10.1(a) provides that a petition for writ of certiorari will be granted "when a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter . . ." Here, the Ninth Circuit is in conflict with the Fifth, Tenth and Eleventh Circuits, as well as the District Courts noted above. Petitioner respectfully asks this Court to review this matter, and resolve the conflict between the circuits.

III. THE LIMITED WAGE GARNISHMENT EXEMPTION IS OUTDATED AND DESTRUCTIVE. CIRCUMSTANCES HAVE CHANGED ENOUGH TO ABOLISH THIS JUDICIALLY CREATED POLICY.

The limited federal wage garnishment exemption began in 1846, with the case of *Buchanan v. Alexander*, 45 U.S. (4 How.) 20 (1846). Boardinghouse keepers in Norfolk sought to garnish the wages of seamen of the frigate Constitution. The court prohibited the garnishment of the money in the hands of the ship's purser, giving two reasons: "At all times it would be found embarrassing, and under some circumstances it might be fatal to the public service." *Id.*

Today the federal government continues to exempt the wages of some of its employees from garnishment, despite tremendous changes in both the facts and the law which have eroded the basis for the Buchanan decision. It would no longer be "embarrassing" for the federal government to act as every other employer in the nation and honor garnishment orders for just debts. It is no longer "fatal to the public service" for the government to do so, since the advent of the computer age and modern payroll systems have made the processing of such applications far easier than it would have been for the frigate's purser. Navy employees are no longer paid in gold, nor are the payments recorded with quill pens on ledger sheets. The computerization and check payment

now utilized by the federal government make it possible for the government to process garnishments and other deductions far more easily than would have been possible by the purser of the Constitution with gold coin and quill pen.

The government already garnishes and deducts from its employees' wages for back taxes, student loans, charities, pension deductions, social security, a thrift savings plan, savings, and health and life insurance. The advent of the computer age and modern payroll systems have changed the process of wage garnishment. These changes justify this Court's decision that the limited federal wage garnishment exemption is no longer needed and should be abolished. Since the policy was created by a Court decision, it can be changed by a Court decision. Circumstances now require such a change.

IV. GARNISHMENT OF AN EMPLOYEE'S WAGES IS NOT AN ACTION AGAINST THE FEDERAL GOVERNMENT.

The basis for the removal of this action is 28 U.S.C. § 1442(a), which allows the removal of actions against the federal government. Obviously, the federal government cannot be sued in a state court. Sovereign immunity prevents it.

But the garnishment of an employee's wages is not an action against the federal government. The instant case is a suit for collection of an undisputed debt, by Petitioner National Business Factors against Respondents Earvie and Bridgette Rollins. This suit is not directed against the federal government. The only action required of the federal government is the processing of the garnishment order, just as every other employer in the country processes them.

Petitioner seeks to take no money from the federal government. The money petitioner seeks to garnish belongs to the *employees,* Mr. and Mrs. Rollins. State courts have recognized that these garnishment actions are not against

the sovereign. The government "is simply required to hold, and finally pay over, a sum of money or property, in which it has no interest, to one person rather than another. Its business is not interrupted; its property is not touched; its functions are not deranged. . ." *Waterbury v. Board of Commrs.*, 10 Mont. 515, 26 P. 1002 (1891).

Wage garnishments are not distinct and separate actions against the sovereign. "It is not a distinct and separate action against the employer, but an additional step in the original action against the judgment debtor. . . . It is clearly distinguishable from an action in which a judgment or decree is sought against a defendant and does not serve to make the state a defendant or party. . ." *First Fin. Co. v. Pellum*, 62 Ill. 2d 86, 338 N.E.2d 876 (1975).

This Court has recognized in a similar case that garnishments are not against the federal government. In *Stafford v. Briggs*, 444 U.S. 527, 543, 100 S.Ct. 774, 783 (1980), this Court held: "A suit for money damages which must be paid out of the pocket of a private individual who happens to be —or formerly was—employed by the federal government, plainly is not one essentially against the United States."

Therefore, Petitioner respectfully submits that an action for garnishment of an employee's wages is not an action against the federal government. It is simply against the employee, who owes the debt. Since the action is not against the federal government, § 1442(a) does not apply, and these actions are not removable. This Court should recognize that garnishment actions are not removable, and uphold the position of the Circuits that now recognize this fact.

V. SINCE GARNISHMENT OF AN EMPLOYEE'S WAGES IS NOT AN ACTION AGAINST THE FEDERAL GOVERNMENT, SOVEREIGN IMMUNITY DOES NOT APPLY.

The decision of the Ninth Circuit in this action held that sovereign immunity prevented garnishment of a federal employee's wages. (See Memorandum of Decision, final sentence.) Since an action for garnishment of an employee's wages is *not* against the federal government, sovereign immunity does *not* apply.

Modern cases regarding the doctrine of sovereign immunity examine the essential impact upon the government to determine whether sovereign immunity applies. In *Land v. Dollar*, 330 U.S. 730, 738, 67 S.Ct. 1009, 1012-13, 91 L.Ed. 1209 (1947), this Court held that the doctrine of sovereign immunity did not apply unless "the essential nature and effect of the proceeding [is] such as to make plain that the judgment sought would expend itself upon the public treasury or domain, or interfere with the public administration." In *Larson v. Domestic & Foreign Commerce*, 337 U.S. 682, 69 S.Ct. 1457, 93 L. Ed. 1628 (1949) this Court held that the doctrine of sovereign immunity did not apply unless the government would be "stopped in its tracks" by a proposed lawsuit.

The new focus on the impact upon the government has become the determining factor in deciding whether to apply the sovereign immunity doctrine. Sovereign immunity's bar to suit now "rests primarily on the principle that litigation must not be allowed to stop or slow down official activities that are essential to governing the nation." *Federal Practice and Procedure*, 2nd Ed., by Wright, Miller & Cooper, West Publishing § 3654, page 201.

The Second Circuit recently held that an order of attachment of funds held by the United States does not implicate

the sovereign immunity doctrine. In *Landau v. Vallen*, 895 F.2d 888, 893 (2d Cir. 1990) the Second Circuit held: "A simple order of attachment of funds held by the United States, in which it has absolutely no interest, does not implicate the sovereign immunity doctrine . . . The United States's involvement is only ancillary, and the sovereign immunity doctrine does not apply."

Since the doctrine of sovereign immunity does not apply to wage garnishments, there is no basis for the government's policy of exempting the wages of its employees from garnishment. Petitioner respectfully submits that this Court should reverse the holding of the Ninth Circuit.

VI. CONCLUSION.

It is unfair for the federal government to prevent the garnishment of the wages of its employees. Its employees incur debts just as all other citizens. However, when federal employees fail to pay their bills, they escape garnishment perpetually. This is immoral.

This policy was created by an 1846 Supreme Court ruling. Now, the Circuits are split about the applicability of this policy. The Fifth, Tenth and Eleventh Circuits hold that a garnishment action is not an action "against the government" and therefore is not removable. The Ninth Circuit still maintains that garnishment actions are "against the government" and therefore are removable. The Court should recognize that garnishment actions are not against the employer. This Court should hold that such actions are not removable, thereby resolving the split between Circuits.

Circumstances have changed tremendously since the Supreme Court created the limited federal wage garnishment exemption. Now there is no justification for the exemption. Instead, the exemption is destructive and creates a vision of unfairness in our own government. This Court should

change the rule about the removability of garnishment actions because of these changed circumstances.

A garnishment directed to collect a portion of the wages of a federal employee is *not* an action against the federal government. The government is simply required to pay a portion of the debtor's wages to the creditor, rather than the debtor. The fact that this type of proceeding is different from a lawsuit directed against the federal government is obvious and should be recognized by the United States Supreme Court. Petitioner respectfully submits that the Fifth, Tenth and Eleventh Circuits are correct in concluding that garnishment proceedings should not be removable and should not be prevented. The holding of the Ninth Circuit should be reversed.

Dated:

Respectfully Submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

NATIONAL BUSINESS FACTORS, INC.,
Plaintiff(s),

vs.

EARVIE and BRIDGETTE ROLLINS,
Defendant(s).

No. C-91-2102-FMS

ORDER GRANTING
GOVERNMENT'S
MOTION TO DISMISS

I. Introduction

The plaintiff, National Business Factors, Inc. ("NBF"), is a debt collection service. Defendants Earvie and Bridgette Rollins are both civilian employees of the Naval Supply Center in Oakland, California. After Mr. and Mrs. Rollins failed to pay for hospital and medical services rendered to them and their minor daughter, a Municipal Court judge entered a default judgment against the Rollins in favor of NBF for $880.19.

The Alameda County Sheriff twice served Earnings Withholding Orders on the Naval Supply Center. The Department of the Navy refused to honor the wage garnishment orders, and refused to appear in Contra Costa County Municipal Court after an Order to Appear was issued.

II. Removal to federal court was proper.

On July 10, 1991, the U.S. Attorney removed the case from Contra Costa County Municipal Court to this Court. On July 22, 1991 this Court issued an order requiring the United States to show cause why case should not be re-

manded. Subsequently, both the United States and NBF filed papers in support of removal. Based on *Nationwide Investors v. Miller,* 793 F.2d 1044 (9th Cir. 1986), a recent Ninth Circuit opinion in a case with similar facts, the garnishment action is properly before this Court.

In *Nationwide,* judgment was obtained in state court for back rent against a civilian employee of the Army Air Force Exchange Service. The judgment creditor procured an order from a municipal court compelling the air force personnel assistant to appear for examination in connection with the debtor's attempt to garnish the defendant's wages. The personnel assistant removed to federal court where the Order to Appear was quashed and the government's motion to dismiss was granted. In finding that removal to federal district court was appropriate, the Ninth Circuit held that a state court garnishment proceeding to which a federal officer has been summoned is a "civil action" under 28 U.S.C. § 1442(a)(1) which provides for removal of any "civil action or criminal prosecution commenced in a State court against . . . [a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office. . . ."

The Rollinses, like the defendant in *Nationwide,* are both civilian employees of the armed forces who failed to pay a debt. NBF, like the plaintiff in *Nationwide,* secured a judgment order from a municipal court and sought to compel the government to garnish wages. NBF's garnishment attempt, like the garnishment action in *Nationwide,* is a civil action against a U.S. officer acting under color of his office and is therefore properly before this Court under 28 U.S.C. § 1442(a)(1).

III. The Department of the Navy may refuse to garnish its employees' wages.

The government moved to dismiss the case on the grounds that federal employees' salaries cannot be garnished

except for alimony, child support and a few other exceptions. While there is some authority to the contrary, it is generally held that, in the absence of special statutory sanction, the compensation of public officers and employees is not subject to garnishment. 38 C.J.S, Garnishment § 116. The government relies heavily on *Buchanan v. Alexander*, 45 U.S. (4 Howard) 20 (1846), in which the Supreme Court held that garnishment actions naming federal disbursing officers are barred absent a waiver of sovereign immunity. In *Buchanan*, boarding-house keepers sought to garnish the wages of seamen. The Court prohibited the garnishment of the money held by the vessel's purser because it would be "embarrassing" and "might be fatal to public service."*Id.*

NBF argues that *Buchanan* is outdated because of changes in both fact and law since 1846. First, it would no longer be "embarrassing" for the federal government honor garnishment orders for debts just as every other employer must do. It is no longer "fatal to the public service" because modern government payroll systems are computerized. In fact, government employees' wages are already garnished in many instances. The United States has waived its immunity to wage garnishment actions in cases involving child support and alimony, in cases involving postal workers, and in a few other isolated instances. *Nationwide, supra* at 1048. NBF argues that the doctrine of sovereign immunity been eroded by several statutory and judicial changes since *Buchanan*. For instance, the Supreme Court, in *Larson v. Domestic & Foreign Commerce*, 337 U.S. 682 (1949), urged application of sovereign immunity only in cases where the government would be "stopped in its tracks" by a proposed lawsuit.

The United States argues that even if *Buchanan* is outdated, and even if the government can process wage garnishments, it is not required to in this case because it has not waived sovereign immunity, and because *Nationwide* is controlling law in this circuit. In *Nationwide*, the Ninth

Circuit upheld the dismissal of the garnishment action because there was no waiver of sovereign immunity.

III. Conclusion

NBF urges this Court to avoid the "pitfall of antiquarianism" by boldly abandoning *Buchanan* (and presumably *Nationwide* as well) because the underlying policy is inequitable, and because "the time for spontaneous growth is upon us." Opposition Brief at 16. This Court recognizes that it is unfair for federal employees to avoid their debts simply because their employer is immune from garnishment actions; the Rollins' hospital bill will likely go unpaid which will result in higher health care costs for others. The government can easily process wage garnishments since federal payroll systems are centralized and computerized.

In 1986, when the Ninth Circuit ruled on *Nationwide*, it had the opportunity to reverse what could be considered an unjust and outdated policy. The Ninth Circuit chose not to sever the federal government's immunity to garnishment actions.

Because *Nationwide* is controlling law in this circuit, this Court grants the United States' motion to dismiss. The government's motion to quash the Order for Appearance and Earnings Withholding Order is also granted.

IT IS SO ORDERED.

DATED: October 10, 1991

FERN M. SMITH
United States District
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

NATIONAL BUSINESS FACTORS, INC.,
Plaintiff(s),

vs.

EARVIE and BRIDGETTE ROLLINS,
Defendant(s).

No. C-91-2102-FMS

JUDGMENT

For the reasons stated in the Order granting the government's motion to dismiss filed October 11, 1991 herein, judgment is hereby entered against plaintiff.

SO ORDERED

DATED: October 16, 1991

FERN M. SMITH
United States District
Judge

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL BUSINESS FACTORS, INC.,

Plaintiff-Appellant,

v.

EARVIE ROLLINS, aka
EARVIE L. ROLLINS;
BRIDGETTE M. ROLLINS,

Defendants-Appellees.

No. 91-16668

DC No. CV-91-02102-FMS

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Fern M. Smith, District Judge, Presiding
Submitted April 14, 1993**
San Francisco, California

Before: SCHROEDER, PREGERSON, and D. W. NELSON, Circuit Judges.

National Business Factors, Inc. ("NBF"), a California debt collection service, appeals the district court's dismissal of its action to enforce a default judgment against two

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel finds this case appropriate for submission without argument pursuant to Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

civilian employees of the Department of the Navy, Earvie L. Rollins and Bridgette M. Rollins, by garnishment of their wages. We affirm.

NBF attempted to collect money owed to the Brookside Hospital by Earvie L. Rollins and Bridgette M. Rollins for hospital services received in November of 1988. Earvie Rollins and Bridgette Rollins are civilian employees of the Department of the Navy at the Naval Supply Center in Oakland, California ("NSCO"). When the Rollinses did not pay NBF, it filed suit in the Municipal Court of California, County of Contra Costa, Bay District, to recover the amount due, $554.50, plus interest and attorney's fees. The court granted a default judgment to NBF for $880.19.

The sheriff for Alameda County issued a garnishment order to NSCO in an attempt to collect the judgment money. NSCO responded that it could not honor the order because it could not garnish the wages under federal law. NBF then served an order on the NSCO to appear for examination. The NSCO again did not honor the order. NBF served an additional order to appear, and suggested that an arrest warrant would be issued if NSCO failed to comply.

The United States Attorney then removed the case to federal district court and filed a motion to dismiss or, in the alternative, for summary judgment. The district court granted the motion to dismiss. The district court first ruled that under *Nationwide Investors v. Miller*, 793 F.2d 1044 (9th Cir. 1986), the case was properly removed to federal court. It then ruled that compensation of public employees is not subject to garnishment, relying on *Buchanan v. Alexander*, 45 U.S. (4 How.) 20 (1846), and on *Nationwide, supra.*

On appeal, NBF argues that the *Nationwide* holding has been eroded by *United States v. Van Cauwenberghe*, 934

F.2d 1048 (9th Cir. 1991). NBF also urges this court to allow the garnishment of wages of federal employees as a matter of sound public policy. We refuse to do so.

The district court was correct in applying *Nationwide Investors v. Miller, supra.* In that case, Nationwide obtained a state court judgment for unpaid rent against Miller, a civilian employee of the Army Air Force Exchange Service. It then sought an order from Sacramento Municipal Court to compel a federal employee in the Air Force to appear in court in connection with Nationwide's attempt to garnish Miller's wages. That employee removed the case to federal court, where the district judge quashed the order to appear and granted the motion to dismiss on the ground of sovereign immunity. We agreed with the district court that the United States had not waived sovereign immunity in these circumstances. *Id.* at 1048.

United States v. Van Cauwenberghe, supra, does not overrule *Nationwide* and does not apply in this case. *Van Cauwenberghe* involved a defendant's Rule 41(e) motion for return of property in the district court. We held that the attachment of property in the registry of the court did not implicate sovereign immunity, because "the attachment of funds in which the government has absolutely no interest cannot be barred by the doctrine of sovereign immunity." *Id.* at 1063. The circumstances are completely different here. The government retains an interest in the wages it would pay to the Rollinses, and *Van Cauwenberghe* does not apply. *See Buchanan,* 45 U.S. at 20-21 ("So long as money remains in the hands of a disbursing officer, it is as much the money of the United States, as if it had not been drawn from the treasury.").

We decline to follow appellant's suggestion that we change the law of sovereign immunity. *Nationwide* is the law of this circuit. Only an en banc court has the power to reject our precedent unless some intervening Supreme

Court opinion has undermined that precedent. *Landreth v. C.I.R.*, 859 F.2d 643, 648 (9th Cir. 1988). The Supreme Court cases on sovereign immunity do not contradict our holding in *Nationwide*. The Supreme Court has specifically stated that a waiver of sovereign immunity by the United States must be "unequivocally expressed." *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1014 (1992) (citations omitted). The Supreme Court has identified such waivers of sovereign immunity in, e.g., the "sweeping language" of the Federal Tort Claims Act, *see United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951); in the "sue and be sued" clauses of some legislation, *see, e.g., Franchise Tax Bd. of Cal. v. United States Postal Serv.*, 467 U.S. 512, 517-19 (1984); *FHA v. Burr*, 309 U.S. 242, 244-47 (1940); and in cases of alimony and child support, *see* 42 U.S.C. § 659. In *Nordic Village*, the Court explicitly stated that these exceptions do not "eradicate the traditional principle that the Government's consent to be sued must be 'construed strictly in favor of the sovereign.' " 112 S. Ct. at 1014-15 (internal quotations omitted).

Thus Supreme Court precedent supports our *Nationwide* ruling that "[t]he United States has waived its immunity to such actions only in cases of child support and alimony, 42 U.S.C. § 659, in cases involving postal workers, *see* 39 U.S.C. § 401(1), and in a few other isolated situations such as cases involving the Federal Housing Authority, *see FHA v. Burr*, 309 U.S. 242, 244 (1940)," but has not waived its immunity in garnishment actions of this type. 793 F.2d at 1048.

Appellant cites no authority in support of its argument that the United States has given an unequivocal waiver of its sovereign immunity in this situation. We refuse to create an exception to sovereign immunity for reasons of public policy.

AFFIRMED.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-16668
CT/AG#: CV-91-02102-FMS

NATIONAL BUSINESS FACTORS INC.,
Plaintiff/Appellant,
vs.
EARVIE ROLLINS, aka EARVIE L. ROLLINS;
BRIDGETTE M. ROLLINS
Defendants/Appellees.

APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered April 22, 1993

(2)

No. 93-100

Supreme Court, U.S.
FILED
SEP 20 1993
OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL BUSINESS FACTORS, INC., PETITIONER

v.

EARVIE ROLLINS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the sovereign immunity of the United States bars an action to garnish the wages of a civilian employee of the Department of Navy.

2. Whether such a garnishment action may be removed from state court to federal court under 28 U.S.C. 1442(a)(1).

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-100

NATIONAL BUSINESS FACTORS, INC., PETITIONER

v.

EARVIE ROLLINS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A6-A9) is unreported, but the judgment is noted at 991 F.2d 803 (Table). The opinion of the district court (Pet. App. A1-A4) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1993. Pet. App. A10. The petition for a writ of certiorari was filed on July 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 2101(c) (Pet. 1), but properly lies under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, National Business Factors, Inc., is a California debt collection agency. It was assigned for collection the accounts of respondents Earvie L. Rollins and his wife, Bridgette M. Rollins. Those accounts reflected charges against the Rollinses for hospital services provided by Brookside Hospital in November 1988. The Rollinses were, at all relevant times, civilian employees of the Department of Navy. Pet. App. A6-A7.

Petitioner filed a complaint in the Municipal Court of California, County of Contra Costa, Bay District, seeking the account balance of $554.50 plus interest and attorney's fees. The court granted a default judgment to petitioner in the amount of $880.19. Pet. App. A7.

After the default judgment was entered, the sheriff for Alameda County, California, issued a wage-garnishment order to Earvie Rollins's employer, the Naval Supply Center (now the Fleet and Industrial Supply Center) in Oakland, California. The Supply Center responded that it was precluded by federal law from complying with the garnishment order. Petitioner then served an order to appear for examination on the manager of civilian personnel at the Supply Center. After the manager did not appear, petitioner served her with a second order to appear. Each order to appear stated that a failure to comply was punishable by arrest and contempt sanctions. Pet. App. A7.

2. The United States Attorney then removed the case to the United States District Court for the Northern District of California and subsequently moved for dismissal or, in the alternative, for summary judgment. The district court granted the motion to dismiss and quashed both the order for appearance and the garnishment order. Pet. App. A4. The court initially determined that, as both parties agreed, removal of the action

was proper under the Ninth Circuit's decision in *Nationwide Investors* v. *Miller*, 793 F.2d 1044 (1986) (per curiam). Pet. App. A2. The court then held that under longstanding federal law—reflected in *Buchanan* v. *Alexander*, 45 U.S. (4 How.) 20 (1845), and *Nationwide Investors*—the garnishment proceeding was barred by sovereign immunity. Pet. App. A2-A4.

3. The court of appeals affirmed. Pet. App. A6-A9. It upheld the district court's determination that, under *Buchanan* and *Nationwide Investors*, sovereign immunity bars garnishment proceedings against the federal government. Finding no "unequivocal waiver of * * * sovereign immunity" applicable in this case, the court "refuse[d] to create an exception to sovereign immunity for reasons of public policy," as petitioner had urged it to do. Pet. App. A9.

ARGUMENT

Petitioner presents two questions, neither of which warrants further review. The first question—whether sovereign immunity bars garnishment proceedings against the federal government—is controlled by this Court's decision in *Buchanan* v. *Alexander*, 45 U.S. (4 How.) 20 (1845), which held that sovereign immunity does bar such proceedings. The second question—whether such proceedings may be removed from state to federal court—was not properly raised below and, in any event, was correctly decided in the affirmative. That question, moreover, does not warrant further review in this case.

1. "It has long been established * * * that the United States, as sovereign, 'is immune from suit save as it consents to be sued.'" *United States* v. *Testan*, 424 U.S. 392, 399 (1976) (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)); accord, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). This Court applied that principle in *Buchanan*, 45 U.S. (4 How.) at 20-21, to

hold that sovereign immunity barred the attachment of seamen's wages held by a Navy purser. See also *FHA* v. *Burr*, 309 U.S. 242, 244 (1940) (the ruling in *Buchanan* "was derived from the principle that the United States cannot be sued without its consent"). The attachment of wages owed to a federal employee was barred, the Court in *Buchanan* explained, because "[s]o long as money remains in the hands of a disbursing officer, it is as much the money of the United States, as if it had not been drawn from the treasury." 45 U.S. (4 How.) at 20-21.

Petitioner does not dispute that the garnishment proceeding at issue here would be barred under *Buchanan*. Moreover, petitioner does not contend that any Act of Congress waives the federal government's sovereign immunity from garnishment proceedings under the circumstances of this case. Cf. *FHA* v. *Burr*, 309 U.S. at 244-250 ("sue and be sued" clause waived immunity of Federal Housing Authority from garnishment orders). Instead, petitioner argues (Pet. 7) that this Court should overrule *Buchanan* because of "tremendous changes in both the facts and the law which have eroded the basis for the Buchanan decision." That argument is unpersuasive.

The continuing vitality of *Buchanan* has repeatedly been recognized by this Court[1] and the lower federal courts.[2] Writing for the Seventh Circuit, Judge Posner

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[1] See *Franchise Tax Board* v. *USPS*, 467 U.S. 512, 516-517 (1984); *McCarty* v. *McCarty*, 453 U.S. 210, 229 & n.23 (1981); *United States* v. *Shaw*, 309 U.S. 495, 500-501 & n.18 (1940); *FHA* v. *Burr*, 309 U.S. at 244; *Chicago & N. Ry.* v. *Alvin R. Durham Co.*, 271 U.S. 251, 257 & n.6 (1926); *Ex parte United States (The Western Maid)*, 257 U.S. 419, 433 (1922); *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 159 (1886).

[2] See, *e.g.*, *Arizona* v. *Bowsher*, 935 F.2d 332, 334 (D.C. Cir.), cert. denied, 112 S. Ct. 584 (1991); *In re Joliet-Will County Community Action Agency*, 847 F.2d 430, 432-433 (7th Cir. 1988);

recently observed that *Buchanan* is "a decision whose authority seems not to have been impaired by its great age." *In re Joliet-Will County Community Action Agency*, 847 F.2d 430, 433 (7th Cir. 1988). Indeed, petitioner cites no decisions that have gainsaid *Buchanan*'s holding or reasoning with respect to the immunity of the federal government from garnishment proceedings.[3]

The decisions following *Buchanan* have rejected the argument, advanced by petitioner here, that *Buchanan* was based solely on the administrative burdens of requiring the government to comply with garnishment orders. Pet. 7-8. In *McCarty*, this Court explained that, "[r]ather than resting on the grounds that garnishment would be administratively burdensome, *Buchanan* pointed out: 'The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended.'" 453 U.S. at 229 n.23 (quoting *Buchanan*,

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Palmiter v. *Action, Inc.*, 733 F.2d 1244, 1247-1250 (7th Cir. 1984); *United States* v. *Krakover*, 377 F.2d 104, 106 & n.3 (10th Cir.), cert. denied, 389 U.S. 845 (1967).

[3] The state court cases cited by petitioner are inapposite because they concern the issue of whether state or local governments—not the federal government—are "persons" for purposes of state garnishment statutes. Pet. 5, citing *Henderson* v. *Foster*, 319 N.E.2d 789 (Ill. 1974), and *Waterbury* v. *Board of Comm'rs*, 26 P. 1002 (Mont. 1891). See *FHA* v. *Burr*, 309 U.S. at 246-247 (state court decisions concerning amenability of "municipalities, counties and the like * * * involve considerations not germane to the problem of amenability to suit of the modern federal governmental corporation"); see also *International Primate Protection League* v. *Administrators of Tulane Educ. Fund*, 111 S. Ct. 1700, 1707 (1991) ("in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it") (quoting *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989) (brackets supplied by Court in *Will*)).

45 U.S. (4 How.) at 20); see also *OPM* v. *Richmond*, 496 U.S. 414, 428 (1990). The Tenth Circuit similarly has rejected the argument that the *Buchanan* rule is inapplicable when garnishment appears administratively feasible: "Although compliance with the [attachment] order may require only another hole in a punch card and the issuance of two checks rather than one, the controlling factor is the fact of impact on the government rather than the extent of the impact." *United States* v. *Krakover*, 377 F.2d 104, 106 (10th Cir.), cert. denied, 389 U.S. 845 (1967). See generally *United States* v. *Stanley*, 483 U.S. 669, 680-683 (1987). Thus, the court of appeals in this case was faithful to decisions of this Court and those of other circuits when it declined to "change the law of sovereign immunity" enunciated in *Buchanan*. Pet. App. A8.[4]

Moreover, petitioner errs in suggesting (Pet. 7) that courts are free to modify the scope of sovereign immunity based on changed circumstances. "[I]t rests with Congress," not the courts, "to determine * * * whether the United States may be sued." *Minnesota* v. *United States*, 305 U.S. 382, 388 (1939). Indeed, the courts may entertain suits against the United States only when Congress has "unequivocally expressed" an intent to waive sovereign immunity in the text of a statute.

[4] In any event, requiring the government to comply with garnishment orders would not only create significant administrative burdens but also expose the government to suits by the federal employees whose wages were garnished. See *United States* v. *Morton*, 467 U.S. 822, 824-825 (1984) (servicemember sued federal government for honoring garnishment order issued by state court that allegedly lacked personal jurisdiction over servicemember). For that reason, when Congress waived immunity from garnishment actions enforcing child support or alimony obligations, it simultaneously immunized the United States, its officers, and entities from liability with respect to payments made in accord with that waiver. 42 U.S.C. 659(f); see *Morton*, 467 U.S. at 827-836.

United States v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1014-1015 (1992) (quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95 (1990), quoting in turn *United States* v. *King*, 395 U.S. 1, 4 (1969)). Even then, the courts may not "enlarge" a statutory waiver "beyond what the language requires." *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983).

Congress has not waived the government's sovereign immunity from the garnishment proceeding at issue here. Congress has waived the immunity of the United States to garnishment actions only in cases seeking child support and alimony, 42 U.S.C. 659, in cases involving postal employees, 39 U.S.C. 401(1), and "in a few other isolated situations such as cases involving the Federal Housing Authority." *Nationwide Investors*, 793 F.2d at 1048. The existence of those statutory waivers reflects Congress's recognition that garnishment proceedings to attach the wages of federal employees are otherwise barred. Cf. *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-698, 702-703 (1979). Because there is no statutory waiver applicable in the present case, the courts below correctly held that the garnishment proceeding had to be dismissed for lack of jurisdiction. See *Mitchell*, 463 U.S. at 212; *Testan*, 424 U.S. at 399.

2. Petitioner now contends (Pet. 6-7) that there is a conflict among the circuits on the issue whether garnishment proceedings are "civil actions" that may be removed from state court to federal court under 28 U.S.C. 1442(a)(1).[5] Petitioner did not, however, contest

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[5] Section 1442(a) provides in relevant part:

> A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

the propriety of removal in the courts below. On the contrary, in both the district court and the court of appeals petitioner argued that removal was proper under 28 U.S.C. 1442(a)(1). See Plaintiff's Memorandum of Points and Authorities in Support of Removal of Action from State to Federal Court 3-6; Pet. C.A. Br. 4. Because the removal issue was not properly preserved in the courts below, petitioner should not be permitted to raise it in this Court. See, *e.g.*, *United States* v. *Williams*, 112 S. Ct. 1735, 1738-1739 (1992). In any event, the district court correctly determined (in a ruling undisturbed by the court of appeals) that the case was removable under 28 U.S.C. 1442(a)(1). Moreover, there is no conflict among the courts of appeals warranting further review in this case.

a. Section 1442(a)(1) of Title 28 authorizes the removal of "[a] civil action * * * against * * * [a]ny officer of the United States * * * for any act under color of such office." Petitioner does not dispute that the manager of civilian personnel at the Naval Supply Center is an "officer of the United States" for purposes of Section 1442(a)(1). Nor does petitioner dispute that the "under color of office" requirement in Section 1442(a)(1) was satisfied by the government's allegation of a colorable federal defense—*i.e.*, sovereign immunity—to the garnishment proceeding. See *Mesa* v. *California*, 489 U.S. 121, 139 (1989). Instead, petitioner contends that a garnishment proceeding is not a "civil action" for purposes of Section 1442(a)(1) because the government is only a

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

stakeholder in such a proceeding. Pet. 6-7, 8-9. That contention is incorrect.

In *FHA* v. *Burr*, 309 U.S. at 244-250, this Court held that a garnishment proceeding could be maintained against the Federal Housing Authority because it fell within the scope of a provision authorizing the agency to "sue and be sued." In so holding, the Court determined that a garnishment proceeding is a "suit for the collection of a claim." *Id.* at 249. The Court relied on case law broadly construing the term "suit," when used in a statute, to encompass any proceeding in which "a right is litigated between parties in a court of justice." *Id.* at 247 n.8.

In common usage, the term "action" is synonymous with the term "suit." See *Black's Law Dictionary* 28, 1434 (6th ed. 1990); Fed. R. Civ. P. 2. Since Section 1442(a)(1) does not define the term "action," that term should be accorded its ordinary meaning. See, *e.g.*, *Smith* v. *United States*, 113 S. Ct. 2050, 2054 (1993). Because the terms "action" and "suit" are synonymous in common usage, and because this Court held in *Burr* that the term "suit" encompasses garnishment proceedings, the term "action" should likewise be construed to embrace garnishment proceedings. Thus, *Burr* supports the conclusion that a garnishment proceeding is a "civil action" for purposes of Section 1442(a)(1).

Franchise Tax Board v. *USPS*, 467 U.S. 512 (1984), is not to the contrary. There, this Court stated that "it is far from clear that the Postal Service may remove a garnishment action when it is merely a stakeholder and the real party in interest is the employee." *Id.* at 524 n.19. To be sure, that statement is in some tension with the statement in *Buchanan* that money owed to a federal employee, while in the possession of the federal government, "is as much the money of the United States, as if it

had not been drawn from the treasury." 45 U.S. (4 How.) at 21.[6]

Nonetheless, for three reasons the statement in *Franchise Tax Board* expressing doubt whether the Postal Service may remove garnishment proceedings does not undermine the decision of the court of appeals in this case and the decisions of other courts of appeals holding that garnishment proceedings are "civil actions" that may be removed to federal court under 28 U.S.C. 1442(a)(1). First, the statement in *Franchise Tax Board* is dictum; the propriety of the removal of garnishment proceedings was not before the Court. 467 U.S. at 514, 524 n.19; see *Hexamer* v. *Foreness*, 981 F.2d 821, 823 (5th Cir. 1993) (characterizing statement in *Franchise Tax Board* as "dicta"); *Nationwide Investors*, 793 F.2d at 1046 (same). Second, the statement did not concern 28 U.S.C. 1442(a)(1), the removal provision under which the present case was removed.[7]

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[6] See also *Flast* v. *Cohen*, 392 U.S. 83, 119 (1968) (Harlan, J., dissenting) (United States holds funds subject to spending power "not as stakeholder or trustee for those who have paid its imposts, but as surrogate for the population at large"); *United States* v. *Munsey Trust Co.*, 332 U.S. 234 (1947); compare *Honda* v. *Clark*, 386 U.S. 484, 498 (1967) (Attorney General is mere stakeholder of fund, "for it neither comes out of the common weal nor will any surplus inure to the Treasury").

[7] In *Franchise Tax Board*, the Postal Service relied on a different removal provision, 39 U.S.C. 409(a), in asserting a right to remove garnishment proceedings. That provision authorizes the removal of "[a]ny action * * * to which the Postal Service is a *party*." 39 U.S.C. 409(a) (emphasis added). This language lends itself more readily than does the language of Section 1442(a)(1) to the "real party in interest" requirement that the Court in *Franchise Tax Board* suggested might preclude removal of proceedings in which the Postal Service is "merely a stakeholder and the real party in interest is the employee." 467 U.S. at 524 n.19. Compare 28 U.S.C. 1442(a)(1) (authorizing removal of an action "against" a federal officer).

Most importantly, as the court of appeals observed in *Nationwide Investors*, "garnishment proceedings against postal employees are *sui generis* due to the special statutory provisions concerning suits against the Postal Service." 793 F.2d at 1046. The key provision upon which *Franchise Tax Board* was based permitted the Postal Service to "sue and be sued" in its own name, 39 U.S.C. 401(1). See 467 U.S. at 517-522. The Court construed the "sue and be sued" clause to indicate Congress's intent that the Postal Service be subject to some of the same burdens, including wage garnishment, as private commercial enterprises. See *id.* at 518, 520. In the present case, there is no statutory waiver of sovereign immunity—much less a broadly worded waiver such as a "sue and be sued" clause—that could justify treating money in the hands of the Navy the same as money in the hands of a private enterprise rather than as public funds. Cf. *Nordic Village*, 112 S. Ct. at 1014-1015 (cases involving "sue and be sued" clauses "do not * * * eradicate the traditional principle that the Government's consent to be sued must be construed strictly in favor of the sovereign") (internal quotation marks omitted).[8]

b. In *Murray* v. *Murray*, 621 F.2d 103, 106-107 (1980), the Fifth Circuit held that a garnishment proceeding against the Veterans' Administration was not a "civil action" removable under Section 1442(a)(1). That decision appears to conflict with the Ninth Circuit's decision

[8] Because petitioner seeks to reach funds in the possession of the government, this case is unlike *Stafford* v. *Briggs*, 444 U.S. 527, 542 (1980), in which damages were sought from "the pocket of the private individual who happens to be—or formerly was—employed by the Federal Government." The Court in *Stafford* found it "dispositive" that "it [wa]s against individuals and not against the Government that a money judgment is sought." *Id.* at 542 n.10. Accordingly, petitioner's reliance (Pet. 9) on *Stafford* is misplaced.

in *Nationwide Investors*, 793 F.2d at 1046, and the Eighth Circuit's decision in *Overman* v. *United States*, 563 F.2d 1287, 1290-1291 (1977), which upheld the removal of garnishment proceedings under Section 1442(a)(1).[9] Nonetheless, the apparent conflict does not warrant further review in this case. First, as noted above, the removal issue was not properly raised below. That fact, standing alone, weighs heavily against further review.

Second, the state of the law in the Fifth Circuit is not altogether clear. In *Hexamer*, 981 F.2d at 823-824, the Fifth Circuit relied on *Murray* to hold that the Postal Service could not remove a garnishment proceeding against it under either Section 1442(a)(1) or 39 U.S.C. 409(a). For reasons discussed above, however, decisions addressing the removability of actions against the Postal Service are "*sui generis*," *Nationwide Investors*, 793 F.2d at 1046, and thus are of only limited applicability in cases involving other government entities. Moreover, in another recent decision the Fifth Circuit held that a federal officer could, under Section 1442(a)(1), remove an action in order to challenge a subpoena directed to him. *Louisiana* v. *Sparks*, 978 F.2d 226, 231-233 (1992). In so holding, the Fifth Circuit relied on the Ninth Circuit's decision in *Nationwide Investors*, describing it as "adopt[ing] a similar approach in an analogous case." 978 F.2d at 232. In sum, one recent Fifth Circuit decision

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[9] Petitioner asserts (Pet. 6) that *Nationwide Investors* and *Overman* conflict not only with the Fifth Circuit's decision in *Murray* but also with Tenth and Eleventh Circuit precedent. Petitioner does not, however, cite any Tenth Circuit decisions with which *Nationwide Investors* and *Overman* conflict, and we are aware of none. The Eleventh Circuit has cited *Murray* in only one decision of which we are aware, *Loftin* v. *Rush*, 767 F.2d 800, 804-805 (1985). In *Loftin*, the Eleventh Circuit suggested that it considered *Murray* to be binding in that circuit, but it upheld removal in the case before it, finding *Murray* distinguishable.

relies on *Murray*, but another recent Fifth Circuit decision relies on *Nationwide Investors*, the decision with which *Murray* is in apparent conflict. The two recent decisions thus create some doubt whether the apparent conflict between *Murray* and *Nationwide Investors* remains a live one.

In the absence of a clearcut conflict, the removal issue does not warrant further review in this case. The question whether garnishment proceedings may be removed is, as a practical matter, only one of timing from petitioner's perspective. As the Ninth Circuit explained in *Nationwide Investors*, "if a federal officer disobeys the state court Order to Appear, she could be prosecuted for contempt and could then remove under § 1442(a)(1) as a federal officer 'sued or prosecuted' in state court." 793 F.2d at 1046. Thus, even if the government cannot remove a garnishment proceeding, it "will have the power to remove simply by waiting to be sued directly." *Id.* at 1047. For that reason, a decision barring the government from removing garnishment proceedings would benefit a judgment creditor in petitioner's position, if at all, only by delaying—but not preventing—removal. The questionable benefit of such a delay to petitioner is not so significant as to warrant further review in this case.[10]

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[10] That is not to say that the removal issue might not warrant this Court's review at some point in the future. Whereas the consequences for a judgment creditor of a decision barring (or allowing) removal of a garnishment proceeding are minimal—involving only timing—the consequences for the federal official against whom a garnishment order is directed may be significant. Under *Murray*, the federal official may be required "to disobey state court process so that the government can obtain a federal forum." *Nationwide Investors*, 793 F.2d at 1047.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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